Supreme Court, U.S.
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NO. 82-890

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF NEW ORLEANS
and
DAVID MICHELL

versus

JOEL W. MARTIN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Once again, petitioners urge that the trial court prejudiced their rights by not giving their requested jury charge using the words "sudden emergency".[1]

However, it is submitted that the jury was fairly and sufficiently charged with regard to the applicable law and its duty to resolve the issues thereunder; the jury was not misled, nor were petitioners prejudiced by the refusal to give the requested jury charge.[2]

The Fifth Circuit confirmed this point by stating in its opinion:

> "We find that the court below adequately charged the jury on this issue. Although it never spoke in terms of 'emergency' or 'imminent peril,' the court instructed the jury to consider all surrounding circumstances when determining whether Michell's conduct was negligent. The jury was told that negligence is 'the failure to use ordinary care under the circumstances' and that 'ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the

[1] Petitioners' argument was rejected twice by the district judge (prior to giving the jury charges and then again in connection with the petitioners' motion for a new trial), and twice by the Fifth Circuit (once on appeal and then in denying petitioners' suggestion for rehearing en banc).

[2] See the opinion at pages A-11 through A-14 of Petition for Writ of Certiorari. 678 F.2d 1321, 1325-1326 (5th Cir. 1982).

surrounding circumstances, as shown by the evidence in the case.' "
Martin v. City of New Orleans, 678 F.2d 1321, 1326 (5th Cir. 1982)

The Fifth Circuit's opinion is not in conflict with the decision of at least three other circuits as petitioners allege. Petitioners attempt to support their argument by citing a very narrow line of cases. (See page 14 of Petition for Writ of Certiorari). All of those cases involved automobile accidents, a factual situation unrelated to the instant case. Petitioners are unable to find cases in other circuits that are factually compatiable with the case at hand. Therefore, it is necessary to examine cases in the various cited circuits that deal with the issue of the standard for evaluating the sufficiency of jury charges.

When viewing the cases from this standpoint, it is clear that the other circuits are not in conflict with the Fifth Circuit since the cases in these circuits hold that a trial judge may use his own language in giving instructions to a jury and cannot be forced to use the particular language of a requested instruction; and that no fault will be found with the given instruction as long as the language used therein adequately, correctly and understandably presents the issues to the jury. Furthermore, when considering alleged errors in jury instructions, the circuit courts cited by petitioners have reviewed the entire jury charge, and if the instructions, when read as a whole, fairly and adequately state the pertinent legal principles involved in the case, the circuit courts have affirmed the court

below. *Wright v. Farmers Co-op of Arkansas and Oklahoma*, 620 F.2d 694, 697-698 (8th Cir. 1980); *Bern v. Evans*, 349 F.2d 282, 290 (8th Cir. 1965); *Grinder v. Southern Farm Bureau Cas. Ins. Co.*, 590 F.2d 741, 743 (8th Cir. 1979); *Chavin v. Finnlines Ltd., O/Y*, 576 F.2d 1072, 1076 and 1084 (4th Cir. 1978); *E. I. Du Pont De Nemours v. Berkley & Co., Inc.*, 602 F.2d 1247, 1270 (8th Cir. 1980); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 959 (3rd Cir. 1978); *Hopkins v. Jacobsen Mfg. Co.*, 592 F.2d 1013, 1015 (8th Cir. 1979); *Smith v. Borg-Warner Corp.*, 626 F.2d 384, 386 (5th Cir. 1980); *Dwoskin v. Rollins, Inc.*, 634, F.2d 285, 293 (5th Cir. 1981); *Ullman v. Overnite Transportation Co.*, 563 F.2d 152, 157 (5th Cir. 1977); *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 & n.9 (5th Cir. 1979). In *Commercial Iron & Metal Co. v. Bache Halsey, Stuart, Inc.*, 581 F.2d 246, 250 (10th Cir. 1978), for example, the court succinctly concluded:

> "The instructions met the test of sufficiency for, taken as a whole, they adequately and sufficiently advised the jury of the parties' respective contentions and the law applicable thereto."

While some of the automobile accident cases that petitioners cite hold that a specific charge on "sudden emergency" should have been given, none of these cases indicate that the district courts could not have given a jury charge substantially equivalent to one using the words "sudden emergency".

Moreover, the cases do not conflict on the question

of whether federal or state legal standards should be applied in dealing with this procedural issue of jury instructions. The controlling standard is federal. In *Pollock v. Koehring Co.*, 540 F.2d 425, 426 (9th Cir. 1976), the court stated:

> "Although we look to state law for the correct substance of jury instructions, the question whether an incorrect instruction is prejudicially erroneous is a procedural one requiring application of federal law. *Lones v. Detroit, Toledo and Ironton Ry., Co.*, 398 F.2d 914, 920 (6th Cir. 1968), *cert. denied*, 393 U.S. 1063, 89 S.Ct. 714, 21 L.Ed.2d 705 (1969); accord, *Seltzer v. Chesley*, 512 F.2d 1030, 1035 (9th Cir. 1975); see Rule 51, Fed. R. Civ. P.
>
> Our inquiry is, therefore, whether, looking to the instructions as a whole, the substance of the applicable law was fairly and correctly covered. *Bolden v. Kansas City Southern Ry. Co.*, 468 F.2d 580 (5th Cir. 1972)."

See also, *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970); and *Wright v. Farmers Co-Op of Arkansas and Oklahoma*, 620 F.2d 694, 696-697 (8th Cir. 1979) and cases cited therein.

Therefore, although it is unnecessary to address the substantive law issue regarding sudden emergency raised by petitioners in their argument, it is interesting to note their limited statement regarding *London v. Ryan*, 349 So.2d 1334 (La. App. 1st Cir. 1977), *writ denied*, 351 So.2d 171 (La. 1977), the only case cited by petitioners in which

sudden emergency was discussed in the context of an accidental police shooting. Petitioners relate that in that case "a Louisiana court applied the sudden emergency doctrine to an accidental shooting by a police officer." (See p. 9 of Petition for Writ of Certiorari) However, they neglect to mention that the court of appeal found that the trial judge erred in his application of this doctrine to the police shooting since the sudden emergency in which the policemen found themselves was brought about by their own negligence. *London v. Ryan*, 349 So.2d 1334, 1341 (La. App. 1st Cir. 1977), *writ denied*, 351 So.2d 171 (La. 1977). The alleged doctrine of sudden emergency does not apply to one who brings about the perilous or emergency situation by his own negligence. *Hickman v. Southern Pacific Transport Company*, 262 So.2d 385, 389 (La. 1972).[3]

The holding by the Fifth Circuit in this matter does not henceforth preclude, as petitioners would lead the Court to believe, the giving of an instruction on sudden emergency. Surely, the Fifth Circuit did not hold that a sudden emergency charge need never be given as suggested by petitioners. Their argument that this "decision tolls the death-knell for jury charges on every other particularization of the general law of negligence" (page 13-14 of Petition for Writ of Certiorari) is likewise fanciful.

[3] In the instant action, the so-called doctrine of sudden emergency is inapplicable to the facts of this case as a matter of law. Even if this Court was to disregard the testimony of the independent eye witness and view the facts most favorable to plaintiff, the Court would find that there was no emergency until petitioner Michell negligently threw himself in front of and then into a moving vehicle with his gun drawn.

A review on writ of certiorari is not a matter of right, but of judicial discretion. Based on the foregoing, there are no special and important reasons for granting the writ requested by petitioners in this matter. U.S. Sup. Ct. Rule 17, 28 U.S.C.A.

CERTIFICATE OF SERVICE

I, TERRENCE J. LESTELLE, hereby certify that I have on January 10, 1983, by United States Mail, postage prepaid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

CITY OF NEW ORLEANS
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